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No. 05-5705

IN THE
SUPREME COURT OF THE UNITED STATES

HERSHEL HAMMON,

Petitioner

v.

STATE OF INDIANA,

Respondent.

On Petition for Writ of Certiorari to the
Indiana Supreme Court

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The State attempts to portray this case as if the doctrine governing it were well developed, so that the dispute concerns only the particular facts of the case or at most the application of settled doctrine to those facts.[1] The reality is starkly different: As recognized by the majority in *Crawford v. Washington*, 541 U.S. 36 (2004), by the justices who declined to join that majority, and by the Indiana Supreme Court in this case, the decision in *Crawford* left fundamental questions unsettled.[2] The decision of the Indiana Supreme Court in this case rests on its resolution of some of those questions resolutions that are in clear conflict with those reached by many other courts.

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[1] *E.g.*, Respondent State of Indiana's Brief in Opposition to Petition for Writ of Certiorari [hereinafter "BIO"], at 3 ("the Indiana Supreme Court's decision represents nothing more than an ordinary application of *Crawford v. Washington*, 541 U.S. 36 (2004), to one among a potentially infinite variety of factual circumstances . . ."), 4 ("quibbles with the evidentiary basis for the factual finding that Officer Mooney was no conducting an interrogation of Amy").

[2] The *Crawford* majority said, "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" 541 U.S. at 68. Chief Justice Rehnquist objected that

> the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists. . . . is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.

Id. at 75-76 (Rehnquist, C.J., concurring in the judgment). The majority explicitly "acknowledge[d]" the objection that its "refusal to articulate a comprehensive definition" in *Crawford* would "cause interim uncertainty." The majority did not belittle the problem, but rather pointed out that its decision did not worsen the situation, given the inherent, and therefore permanent, uncertainty created by the discarded rule of *Ohio v. Roberts*, 448 U.S. 56 (1980). 541 U.S. at 68 n.10.

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According to the State, "Petitioner's essential argument is a factual dispute concerning whether the Indiana Supreme Court made an erroneous determination that Officer Moody was merely attempting to determine whether a crime had been committed." BIO. at 5. The State's assertion appears to reflect a misunderstanding of our argument. We contend that the Indiana Supreme Court applied an incorrect legal standard that is in conflict with the legal standard adopted by several other jurisdictions. Under the correct standard, we contend, Amy Hammon's accusatorial statement was testimonial *whatever* Officer Mooney's motivation may have been in soliciting it – and it would be testimonial even if Officer Mooney had not solicited it.

According to the Indiana Supreme Court, the critical question is one of motive – whether the statement was "given or taken in significant part for purposes of preserving it for potential future use in legal proceedings." 829 N.E.2d at 456 – and "the motive of the questioner, more than that of the declarant, is determinative." *Id.* As we explained in our petition, we believe this is incorrect – and in conflict with other jurisdictions – on both counts: The question is one of anticipation, rather than motive, and it is the anticipation of the declarant that is critical.[3] *See, e.g., United States v. Summers*, 414 F.3d 1287, 1302 (10th Cir.2005) ("[W]e believe [that in comparison to a narrower approach] an objective test focusing on the reasonable expectations of the declarant under the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment. Thus we

[3] In addition, the "for purposes of preserving it" language is at best very misleading. In light of the Indiana Supreme Court's decision in this case, it appears that this phrase means that an oral accusation will not be deemed testimonial – even if (as in this case) it is made directly to police officers and is followed up immediately by a written affidavit of the same effect.

hold that a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." (citation omitted)); *United States v. Cromer*, 389 F.3d 662, 675 (6th Cir.2004) (stating that the decisive inquiry in assessing Confrontation Clause questions is "whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime"); *United States v. Saget*, 377 F.3d 223, 229 (2d Cir.2004) ("the [*Crawford*] Court would use the reasonable expectation of the declarant as the anchor of a more concrete definition of testimony"); *Commonwealth v. Gonsalves*, 833 N.E.2d 549, 558 (Mass. 2005) ("The proper inquiry is whether a reasonable person in the declarant's position would anticipate the statement's being used against the accused in investigating and prosecuting a crime.").

The difference is not merely linguistic or theoretical. Rather, it has enormous practical implications. The Indiana Supreme Court said that "responses to initial inquiries by officers arriving at a scene are typically not testimonial." In fact this assertion understates the effect of the court's decision. As we have contended, Petition at 19-22, the decision amounts to a virtually *per se* rule that an oral accusation made to an officer at the scene of a crime before any formal recording has been made is not testimonial.[4] Jurisdictions conscientiously applying a sounder test, by contrast, are far

[4] The discussion of the particulars of the case in our Petition is aimed principally at showing the breadth of the impact of the Indiana Supreme Court's decision, and the vulnerability to manipulation of the standard articulated by that court. Although the court purported to pay some attention to Amy's perspective, its discussion was very brief and entirely conclusory. If Amy's statement was not testimonial, we contend, then it is virtually always possible for a responding officer to take an oral accusatory statement at the scene (assuming the witness is willing to make one) without the statement being excluded by the Confrontation Clause.

more likely to recognize that accusatory statements to a police officer at the scene of an alleged crime are almost inevitably testimonial.

Thus, for example, in *Cromer*, *supra*, the United States Court of Appeals for the Sixth Circuit noted that a "statement made knowingly to the authorities that describes criminal activity is almost always testimonial." 389 F.3d at 675 (quotation and citation omitted). In *United States v. Arnold*, 410 F.3d 895 (6th Cir. 2005), the same court applied the *Cromer* standard to accusatory statements made by the complainant in a 911 call and to responding officers at the scene of the alleged crime – including an identifying statement made to the police when the accused arrived at the scene – and held that all of these were testimonial. (Neither *Cromer* nor *Arnold* is mentioned in the State's brief.) In *United States v. Hinton*, ___ F.3d ___, 2005 WL 2218919 (3d Cir. Sept. 14, 2005), issued since the State filed its Brief in Opposition in this case, the court also adopted the *Cromer* standard and applied it to a statement made by the complainant to police officers

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Our understanding of the breadth of the Indiana Supreme Court's decision is confirmed by the State's assertion that in this case "the police officer that elicited the statement did so before having evidence that a crime had been committed." BIO at 5. At first glance, this assertion is mystifying; as summarized in our Petition, at 22, before Amy made her oral accusatory statement, Officer Mooney had considerable evidence that a crime had been committed. What the officer did *not* have yet, of course, was an accusatory statement. Thus, the State's understanding appears to be that a responding officer can secure an accusation without its being considered testimonial; the key is to secure an oral accusation, for a written one, like the affidavit in this case, will likely be considered testimonial.

In one other respect, we are perplexed by the State's gloss on the decision of the Indiana Supreme Court. In an attempt to ensure that statements made unknowingly to undercover investigators shall not be deemed testimonial – a result with which we agree – the State indicates that under the decision of the Indiana Supreme Court it is a necessary (not merely sufficient) condition for a statement to be deemed testimonial that a reasonable person in the declarant's position would have anticipated use in legal proceedings. BIO at 7-8. We do not believe anything in the decision of the Indiana Supreme Court supports this reading.

in their squad car while cruising at the scene of the crime. The court held that the statement – identifying the accused as the assailant – was testimonial: the statement was spontaneous, made upon spotting the accused and apparently without any interrogation by the police.

Some state courts have reached similar conclusions. In *Gonsalves*, *supra*, decided since our petition was filed, the court, after adopting the *Cromer* standard, strongly indicated that an accusatory statement made by the complainant to responding officers was testimonial, even though the complainant remained sufficiently upset to satisfy the state's "spontaneous exclamations" exception to the rule against hearsay.[5] And the Georgia Supreme Court has repeatedly held that accusatory statements made to a police officer during a "field investigation" shortly after an alleged criminal incident are testimonial. *E.g.*, *Moody v. State*, 594 S.E.2d 350 & n.6 (Ga. 2004).

We do not believe it is necessary to explore further here the variations among jurisdictions' responses to the problem presented of statements to responding officers. *Cf. State v. Wright*, 701 N.W.2d 802, 812 (Minn. 2005) (reviewing decisions addressing

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[5] The State attempts to distinguish *Gonsalves* on the basis that in *Gonsalves* "the defendant had left the scene when police arrived and there was no ongoing threat to be assessed through questioning." BIO, at 5. Of course, we do not agree that the presense of the accused or of an ongoing threat prevents a statement from being considered testimonial. In some of the cases holding accusatory statements to responding officers to be testimonial, the accused remained, or had returned, to the scene. *See Arnold*, *supra*; *Hinton*, *supra*; Lopez v. State, 888 So.2d 693 (Fla. App. 2004); People v. Victors, 819 N.E.2d 311 (Ill. App.2004); Mason v. State, 2005 WL 1531286 (Tex. App. June 30, 2005). Moreover, given that an officer was already in the presence of the accused, we doubt that there was any more of an "ongoing threat" in this case than in those: that Officer Mooney's next step was to give Amy an affidavit form to fill out indicates that his conduct was not guided by the need to defuse an ongoing threat.

"the admissibility of statements made during field investigations").[9] That some jurisdictions take an approach that is radically different from that of Indiana is beyond genuine dispute.

CONCLUSION

We believe the crucial considerations governing the question of whether to grant the petition in this case are all quite clear. There is a sharp conflict among jurisdictions concerning the standard determining whether an accusatory statement made to a responding police officer is testimonial for purposes of the Confrontation Clause. This conflict is one of great public importance and it will not be resolved without intervention by this Court. More than a year and a half having passed since *Crawford* and the matter having been addressed in many lower-court decisions, delay offers no substantial advantages but entails large costs. This case presents an ideal vehicle for this Court to address the matter.

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[9] *Wright* noted that "there has been little consensus as to whether the statements are testimonial." It identified three groups of cases. First, some discerned a *per se* rule that such statements are not testimonial. Second, at the other end, *Arnold supra*, and *Moody supra*, "have deemed statements made during field investigations to be testimonial" as a categorical matter. Finally, a large group of decisions, including (in the *Wright* court's assessment) that of the Indiana Court of Appeals in this case, avoid a categorical rule and conclude that "certain statements produced during a field investigation may be nontestimonial." *Wright* joined this latter group and listed considerations that it believed should bear on the determination. 701 N.W.2d at 812.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 20th day of September, 2005.

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PROOF OF SERVICE

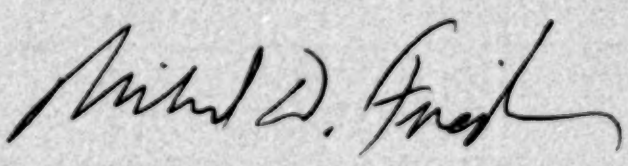
I, Richard D. Friedman, do swear or declare that on this date, September 20, 2005, as required by Supreme Court Rule 29 I have served the enclosed PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Attorney General Steve Carter
c/o Deputy Attorney General Nicole M. Schuster
Indiana Government Center South
302 W. Washington St., Fifth Floor
Indianapolis, IN 46204

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 20, 2005



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September 20, 2005

Hon. William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Hershel Hammon v. State of Indiana*, No. 05-5705

Dear Sir:

Enclosed for filing are the original and ten copies of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari in the above-captioned case, together with Proof of Service.

I believe all this is in order; if not, I would appreciate your letting me know.

Thank you for your kind consideration.

Sincerely,

Richard D. Friedman

Enclosures

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